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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 2002

MAHINDER S. UBEROI, *Petitioner*
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAHINDER S. UBEROI, *pro se*
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32 pp

QUESTION PRESENTED

Equal Employment Opportunity Commission ruled that in accordance with its Priority Charge Handling Procedures it will not further pursue petitioner's charge of employment discrimination. And it dismissed the charge. But it willfully refused to issue to petitioner his right to sue the respondents named in the charge as secured to him by 42 U.S.C. § 2000e-5(f)(1). Petitioner complained to the district court to compel EEOC to perform its statutory duty unlawfully withheld. The court dismissed the complaint for lack of subject matter jurisdiction and failure to state a claim on which relief may be granted. The court of appeals affirmed the dismissal.

Did the United States Court of Appeals for the District of Columbia Circuit have any discretion to refuse to order the Commission to obey the command of 42 U.S.C. § 2000e-5(f)(1) to issue petitioner his right to sue the respondents named in his charge of employment discrimination?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

MAHINDER S. UBEROI, ***petitioner***

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ***respondent***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Mahinder S. Uberoi, respectfully prays that a writ of certiorari issue to review the judgment without opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above proceedings on June 10, 2002, rehearing denied on September 17, the mandate issued on October 1, 2002.

OPINIONS BELOW

The decision of the Court of Appeals for the District of Columbia Circuit has not been reported. It is reprinted in the appendix hereto, p. a1, *infra.*

The decision of the United States District Court for the District of Columbia is reprinted in the appendix hereto, p. a4, *infra.*

JURISDICTION

Equal Employment Opportunity Commission (EEOC) ruled that in accordance with its Priority Charge Handling Procedures it will not further pursue petitioner's charge of employment discrimination. And it dismissed the charge. But it willfully refused to issue to petitioner his right to sue the respondents named in the charge as secured to him by 42 U.S.C. § 2000e-5(f)(1). Petitioner sued EEOC in the district court for the district of Columbia. On August 16, 2001 the court dismissed petitioner's complaint for lack of jurisdiction and failure to state a claim on which relief may be granted. On January 16, 2002 it denied petitioner's motion to alter or amend its judgment.

Under 28 U.S.C. § 1291 petitioner appealed to the United States court of appeals for the district of Columbia circuit. On June 10, 2002 the court affirmed the judgment of the district court. On September 17, 2002 it denied petition for rehearing. On October 1, 2002 it issued the mandate.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 706(1): The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed. 42 U.S.C. § 2000e-5(b): Whenever a charge is filed with EEOC, it shall serve a notice of the charge on the respondents named in the charge within ten days. 42 U.S.C. § 2000e-5(f)(1): It commands that after dismissing a charge, EEOC shall issue to the aggrieved charging party the right to sue in the district court the respondents named in the charge.

STATEMENT OF THE CASE
Proceedings before Equal Employment Opportunity Commission (EEOC)

Petitioner, Mahinder S. Uberoi, is a distinguished aerospace engineer, scientist and educator, as indicated in standard references, such as *Who's Who in America* or *Who's Who in the World*, current editions.

On December 13, 2000 petitioner filed a charge with the Denver District Office of EEOC. He alleged that on February 17, 2000 nine individual respondents conspired to revoke his tenured professorship at the University of Colorado, effective February 28, 2001, because he opposed their discriminatory employment practices and because of his Asian Indian race and origin. See the respondents named in the caption of the notarized charge in the appendix hereto, p. a15, *infra*.

EEOC refused to serve a notice of the charge on any of the nine respondents. Instead, it served a notice on University of Colorado which is not a legal entity of any kind and was not named a respondent in the charge. EEOC manufactured a "perfected charge" in which the nine respondents in petitioner's charge were replaced by University of Colorado which emaciated and misrepresented petitioner's charge. He refused to sign the "perfected charge" under oath.

Petitioner filed with the EEOC an amended charge alleging additional unlawful employment discriminations against him. And he named nine additional respondents. 29 CFR 1601.12(b) provides that a charge may be amended. See the respondents named in the caption of the notarized amended charge in the appendix hereto, p. a16, *infra*. The respondents included members of the Privilege and Tenure Committee of the faculty. The committee is a labor organization as defined by 42 USC § 2000 e-(d) since it deals with the faculty's employers (Regents of University of Colorado) about faculty grievances concerning terms,

conditions and privileges of employment. Petitioner alleged that the members of the committee unfairly processed and unfairly represented to the Regents his grievances about employment discriminations because of his Asian Indian origin. EEOC refused to serve the notice of the amended charge on any of the respondents named therein, not even the University of Colorado, a respondent it had invented.

EEOC notified petitioner that in accordance with its Priority Charge Handling Procedures, the charge *Uberoi v. University of Colorado* [sic] will not be pursued further, p. a18, *infra*. It enclosed a Dismissal of Charge and Right to Sue University of Colorado but not any of the respondents named in the charge. See appendix hereto p. a19, *infra*.

Under 29 CFR § 1601.19(b), EEOC and its district directors have the authority to reconsider the determination of a charge. They denied petitioner's request to issue him the right to sue the respondents named in the charge and the amended charge.

Proceedings in the United States District Court for the District of Columbia

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Under U.S.C. §§ 1361, 2201, 2202 and inherent authority of the court, petitioner filed a complaint against EEOC. He prayed that the court compel EEOC to issue him the right to sue the respondents named in his charge and the amended charge. The court dismissed the complaint for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1) because the Administrative Procedures Act does not apply to EEOC. However, APA statute 5 U.S.C. § 706(1) commands that the reviewing court shall compel agency action unlawfully withheld or unreasonably delayed.

The court also dismissed the complaint for failure to state a claim on which relief may be granted, Fed. R. Cov. P. 12(b)(6). It cited *Smith v. Cassellas*, 119 F.3d, 33, 34 D.C. Cir. 1997. Congress has not authorized, either explicitly or

implicitly, a cause of action against the EEOC, for EEOC's alleged negligence or malfeasance in processing an employment discrimination charge. However, petitioner was not complaining about EEOC's processing of the charge. He prayed the court to compel EEOC to issue petitioner his right to sue the respondents named in the charge and amended charge as mandated by 42 U.S.C. § 2000e-5(f)(1).

Proceedings before the United States Court of Appeals for the District of Columbia Circuit

The court affirmed, without an opinion, the district court judgment dismissing petitioner's complaint. It recited some of the reasons given by the district court for its judgment.

REASONS FOR GRANTING THE WRIT

I. Mandamus was mandatory

42 USC § 2000 e-5(b) commands that whenever a charge is filed with EEOC, it **shall** serve a notice of the charge on the respondents within 10 days.

In willful violation of the statute, EEOC refused to serve a notice of the charge on any of the respondents named in the charge, and it refused to serve a notice of the amended charge on any of the respondents named in the amended charge.

42 USC § 2000 e-5(f)(1) commands that after dismissing a charge, EEOC **shall** issue to the aggrieved charging party the right to sue in the district court the respondents named in the charge and in the amended charge.

In willful violation of the statute, EEOC refused to issue to petitioner the right to sue any of the respondents named in the charge and the amended charge. Instead, it issued the right to sue University of Colorado, which is not a

legal entity of any kind and was not named a respondent in the charge.

Declaratory judgment and mandamus were **mandatory** in the circumstances of this case. *Lexicon Inc. v. Millberg Weiss*, 523 US 26 1998 held at 42 that "**No discretion is to be left to a court faced with an objection to a statutory violation.**" And it held at 35 that "The [Congressional] Panel's instruction [in the statute] comes in terms of **mandatory shall which normally creates an obligation impervious to judicial discretion.**" Emphasis added.

Association of American Railroad v. Costle, 562 F.2d 1310 (D.C. Cir. 1977) held at 1312 that "**The word shall is the language of command in a statute.**" Emphasis added.

Administrative Procedures Act Statute 5 USC § 7O6(1) commands that the reviewing court **shall** compel agency action unlawfully withheld or unreasonably delayed. [Emphasis added].

The judgment of the Court of Appeals states:

Appellant failed to state a claim upon which relief could be granted. "Congress has not authorized, either explicitly or impliedly a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in an employment discrimination charge." *Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997).

Smith is distinguished from the case at hand in several respects. In *Smith* the EEOC did not refuse to serve the notice of the charge on the respondent. And after dismissing the charge, the EEOC did not refuse to give to the charging party the right to sue the respondent. The complainant had complete remedy for any negligence or malfeasance of EEOC. He could sue the respondent in the district court as provided for in 42 USC § 2000 e-5(f)(1). Here EEOC refused to serve the notice of the charge on the respondents named in the charge and in the amended charge. And it refused to issue to petitioner the right to sue the respondents. Thereby EEOC

has destroyed his right under 42 USC § 2000 e-5(f)(1) to sue the respondents. This is a case of first impression.

The judgment of the Court of Appeals further states:

Moreover, to the extent appellant sought a writ of mandamus under 28 USC § 1361, he did not satisfy the stringent requirements necessary for such a writ to issue. *See Northern States Power Co. v. Department of Energy*, 128 F. 3d 754, 758 (D.C. Cir. 1997). ("Mandamus is proper if (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act, and (3) there is no other remedy available to plaintiff.")

This is a general statement on the law of mandamus. Petitioner has met all three requirements. (1) Petitioner has a statutory right to file a charge of employment discrimination with EEOC against named respondents; (2) EEOC has the statutory duty that it **shall** serve a notice of charge on the respondents and (3) EEOC has destroyed the only remedy available to petitioner, namely, his right to sue the respondents in the district court under 42 USC § 2000 e-5(f)(1). The Court of Appeals should have made this remedy available by a writ of mandamus.

In the end, generally, the writ of mandamus is still left to the sound discretion of the court. Here, EEOC has violated 42 USC § 2000 e-5(b) and 2000 e-5(f)(1). The law pronounced by the Supreme Court in *Lexicon Inc., supra*, is that **"No discretion is left to a court faced with an objection to a statutory violation."** [Emphasis added] Thus mandamus was obligatory here.

II. EEOC obstructs due administration of justice by disobeying statutes prohibiting unlawful employment discrimination

The statutes 42 USC § 2000 e *et seq.*, make unlawful any discrimination in employment based on an individual's race, color, religion, sex or national origin. The statutes also

established EEOC and *inter alia* command EEOC to perform specific duties.

EEOC refused to serve a notice of the charge on the respondents named in the charge and the amended charge. After dismissing the charge, EEOC refused to give petitioner the right to sue the respondents. EEOC is obstructing due administration of justice by refusing to obey the statutes enacted to prohibit unlawful employment discrimination.

III. EEOC is wasting its scarce resources

It is very simple and easy for EEOC to obey the commands of 42 USC § 2000 e-5(b) and § 2000 e-5(f)(1). Namely to serve a notice of the charge on the respondents named in the charge and the amended charge and then to issue petitioner the right to sue them in the district court.

Instead, EEOC is wasting its scarce resources to compel petitioner to engage EEOC in needless proceedings in its Denver District Office, in the Commissioners' offices in Washington, D.C., in the district court, in the Court of Appeals, and now in this Court. All this to compel EEOC to perform its duties commanded by the statutes.

This in face of EEOC's claims that it lacks resources to fully investigate all the charges of unlawful employment discrimination filed with it, as for example petitioner's charge and amended charge.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted

Mahinder S. Uberoi, *pro se*

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 01-5389 September Term, 2002 01cv01579
Filed On: September 17, 2002

Mahinder S Uberoi, Appellant
v.
Equal Employment Opportunity Commission, Appellee

BEFORE: Randolph, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed July 24, 2002, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk
BY: Michael C McGrail, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 01-5389 September Term, 2001 01cv01579
Filed On:June 10, 2002 Mandate issued on Oct. 1, 2002

Mahinder S Uberoi, Appellant
v.
Equal Employment Opportunity Commission, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Randolph, Tatel and Garland, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties The court has determined that the issues presented occasion no need for an opinion *See* Fed. R. App. P. 36; D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the district court's judgment dated August 16, 2001 dismissing appellant's complaint be affirmed. Appellant failed to state a claim upon which relief could be granted. "Congress has not authorized, either expressly or impliedly, a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge." *Smith v. Casellas*, 119 F. 3d 33, 34 (D.C. Cir. 1997) Moreover, to the extent appellant sought a writ of mandamus under 28 U.S.C. § 1361, he did not satisfy the stringent requirements necessary for such a writ to issue. *See Northern States Power Co. v. Department of Energy*, 128 F. 3d 754, 758 (D.C Cir. 1997) ("Mandamus is proper only if (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.") (citations and internal quotation marks omitted).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 01-5389 September Term, 2002 01cv01579

Filed On: September 17, 2002

Mahinder S Uberoi, Appellant

v.

Equal Employment Opportunity Commission, Appellee

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk
BY: Michael C. McGrail, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 01-5389 September Term, 2002 01cv01579
Filed On: September 17, 2002

Mahinder S Uberoi, Appellant

v.

Equal Employment Opportunity Commission, Appellee

BEFORE: Randolph, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's motion to issue an opinion in this case and publish the opinion, it is ORDERED that the motion be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk
BY: Michael C. McGrail, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1579 (RMU) Filed August 16, 2001
Document Nos.: 2,3,4

MAHINDER S. UBEROI, *pro se,* Plaintiff
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.

ORDER

Granting the Defendant's Motion to Dismiss; Denying the Plaintiff's Motion for a Preliminary Injunction

Upon consideration of the Plaintiff's Motion for a Preliminary Injunction and the Defendant's Motion to Dismiss, and for the reasons stated in the court's Memorandum Opinion, it is this 16th day of August 2001, ORDERED that the defendant's motion to dismiss be GRANTED; and it is FURTHER ORDERED that the plaintiff's motion for a preliminary injunction be DENIED.

SO ORDERED.

Ricardo M. Urbina, United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1579 (RMU) Filed August 16, 2001
Document Nos.: 2,3,4

MAHINDER S. UBEROI, *pro se,* Plaintiff
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant

MEMORANDUM OPINION

Granting the Defendant's Motion to Dismiss; Denying the Plaintiff's Motion for a Preliminary Injunction

I. INTRODUCTION

This matter is before the court on the defendant's motion to dismiss for lack of subject-matter jurisdiction or, alternatively, for failure to state a claim on which relief can be granted. The plaintiff, Mahinder S. Uberoi, seeks a declaratory judgment stating that the defendant, the United States Equal Employment Opportunity Commission ("EEOC"), acted in derogation of its statutory authority by modifying the language in the plaintiff's racial discrimination charge. The plaintiff also seeks an order and preliminary injunction from the court forcing the EEOC to serve the plaintiff's charge and withdraw its Dismissal and Notice of Rights. The EEOC argues that the court lacks subject-matter jurisdiction over the plaintiff's complaint because the government has not waived sovereign immunity with regard to the plaintiff's claims against the EEOC. For the reasons stated below, the court will grant the defendant's motion to dismiss.

II. BACKGROUND

Mahinder Uberoi became a tenured professor of aerospace engineering at the University of Colorado in 1963. *See* Compl. ¶¶ 2, 5; Def.'s P. & A. at 2. On December 13, 2000, Dr. Uberoi filed an employment discrimination charge with the EEOC's Denver Office. *See* Compl. ¶ 5; Def.'s P. & A. at 2. In the charge, Dr. Uberoi alleged that "individual regents, some named administrators and faculty members of

the University conspired to engage in unlawful employment discrimination against [Dr.] Uberoi because of his Asian Indian origin, color and race." Compl. ¶ 5; *see also* Def.'s P. & A. at 2. Dr. Uberoi also alleged that the University "retaliated against him because he opposed their racially motivated discrimination against employees and prospective employees of the University and he has refused to participate in such unlawful practices." Compl. ¶ 5.

The EEOC did not serve the charge on the University, however, because it believed that Dr. Uberoi's seventy-one page submission lacked specificity, was untimely, and contained matters beyond the EEOC's jurisdiction. *See id.* ¶ 6. Dr. Uberoi offered to amend the charge if the EEOC provided specific recommendations for improvement. *See id.* ¶¶ 6, 7. The EEOC made no such recommendations; instead, it mailed Dr. Uberoi a "perfected" charge which Dr. Uberoi was to sign under oath and re-submit to the EEOC. *See id.* ¶ 7. Dr. Uberoi refused to sign the "perfected" charge because he believed it missstated and poorly advocated his grievances. *See id.*, App. 1 at 3. The EEOC nonetheless conducted five months of investigation into the issues raised in the "perfected" charge. *See* Def.'s P. & A. at 2. On May 17, 2001, the EEOC informed the plaintiff that "the Commission is unable to conclude that the information obtained establishes violations of statutes." Compl. App. IV, Ex. B. Accordingly, the EEOC dismissed Dr. Uberoi's charge and notified him of his right to sue the University in federal court. *See* Compl., App. IV, Ex B; Def.'s P. & A. at 2. Dr. Uberoi now sues the EEOC for having modified his initial charge.

II. DISCUSSION

A. Legal Standard

The defendant moves to dismiss the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, Rule 12(b)(6). Rule 12(b)(1) deals with the court's subject-matter jurisdiction, while Rule

12(b)(6) "presents a ruling on the merits with a res judicata effect." *See Hasse v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

Under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *See District of Columbia Retirement Bd. V. United States*, 657 F. Supp. 428, 431 (D.D.C. 1987). Because subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority. *See* 5A Wright & Miller, Fed. Prac. & Proc. Civ. 2D § 1350. For this reason, "the [p]plaintiff's factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion: than in resolving a 12(b)(6) motion for failure to state a claim. *See id.*

In deciding a 12(b)(1) motion, the court need not limit itself to the allegations of the complaint. *See Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, "[t]he court may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case." *Scolaro v. D.C. Board of Elections and Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citing *Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *see also Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

A rule 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted tests not whether the plaintiff will prevail on the merits, but whether the plaintiff has properly stated a claim. *See* Fed. R. Civ. P. 12(b)(6); *Scheuer v. Rhodes*, 416 U.S. 232, 236, (1974), *overruled on other grounds by Harlow v. Fitgerald*, 457 U.S. 800 (1982). The court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing

Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In deciding such a motion, the court must accept as true all well-pleaded allegations and draw all reasonable inferences in the plaintiff's favor. *See Maljack Prods. V. Motion Picture Ass'n*, 52 F.3d 373, 375 (D.C. Cir. 1995).

B. Congress Has Not Waived Sovereign Immunity With Regard to the Plaintiff's Claim

Under the doctrine of sovereign immunity, the United States is immune from suit and may define the conditions under which it will permit actions against itself. *See, e.g., McElrath v. United States*, 102 U.S. 426 (1880). Waivers of sovereign immunity must be "unequivocally expressed" in statutory text," *see, e.g., Lane v. Pena*, 518 U.S. 187, 192 (1996), and "[waivers] are not to be implied." *Soriano v. United States*, 352 U.S. 270, 276 (1957). Because "sovereign immunity is jurisdictional in nature," *Malone v. Bowdoin*, 369 U.S. 643, 645 (1962), any party bringing an action against the United States has the burden of alleging that the government has waived its immunity with regard to the claim at issue. *See FDIC v. Meyer*, 510 U.S. 471 (1994). A claimant's failure to establish waiver deprives the court of subject-matter jurisdiction. *See id.*

Although courts have held that "claims for money damage against the EEOC are barred by sovereign immunity," *Clissuras v. EEOC*, 1990 WL 96754, *4 (S.D.N.Y. 1990); *see also McCartin v. Norton*, 674 F.2d 1317, 1321-22 (9th Cir. 1982), it is less clear whether claims for non-monetary relief are similarly barred. The only conceivable indication that the government has waived immunity for non-monetary suits against the EEOC is the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et. seq.*, which allows judicial review of agency actions when those actions have "determinate consequences for the party to the proceeding." *See ITT v. Electrical Workers*, 419 U.S. 428, 443 (1975). Yet the APA is inapplicable to challenges of EEOC investigations, for "[t]he EEOC's negligence or inaction in the

internal processing of a complaint has no determinate consequences because such actions are merely preparatory to a lawsuit by either the EEOC or the charging party in federal district court[, and] only the district court may fix liability." *Ward v. EEOC*, 719 F.2d 311, 313-314 (9th Cir. 1983). Moreover, as discussed above, when a court is uncertain whether the government has waived sovereign immunity, the court *must* assume that immunity has not been waived. *See, e.g., Lane*, 518 U.S. at 192. This court therefore assumes that the government retains immunity from the plaintiff's suit against the EEOC.[1] Accordingly, the court will dismiss the plaintiff's complaint for lack of subject-matter jurisdiction.

C. The Plaintiff's Complaint Would Also Fail Under Rule 12(b)(6)

Even assuming *arguendo* that the court has subject-matter jurisdiction over the plaintiff's complaint, the court would have to dismiss the complaint under Rule 12(b)(6) for two reasons. First, the D.C. Circuit and circuits across the county have held that "Congress has not authorized, either expressly or impliedly, a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge." *Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997); *see also Baba v. Japan Travel Bureau Int'l, Inc.*, 111 F.3d 2, 4 (2d Cir. 1997); *Scheerer v. Rose State College*, 950 F.2d 661, 663 (10th Cir. 1991); *McCottrell v. EEOC*, 726 F.2d 350, 351-52 (7th Cir. 1984); *Ward v. EEOC*, 719 F.2d 311, 312-14 (9th Cir. 1983); *Francis-Sobel v. University of Maine*, 597 F.2d 15, 17-18 (1st

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[1] There are situations—for example, when an employee of the EEOC sues the EEOC for racial discrimination—in which this court's discussion of immunity *vis-à-vis* the plaintiff's complaint would not apply. *See, e.g., Ward*, 719 F.2d at 313 ("present or former [EEOC] employees ... who allege an unlawful employment practice committed by the EEOC as an employer may bring a Title VII action against the EEOC").

Cir. 1979); *Gibson v. Missouri Pac. R.R. Co.*, 579 F.2d 890, 891 (5th Cir. 1978). As one court has stated,

> Congress intended that the private right of action preserved by § 706(f)(1) [of Title VII] be the all-purpose remedy for charging parties dissatisfied with the EEOC's handling of their charge. In short, we do not think congress could have been more clear in expressing its intent that the private right of action preserved by § 706(f)(1) is "an adequate remedy in a court" for the alleged shortcomings in the EEOC's handling of the plaintiffs' charges.

Held v. EEOC, 456 F.Supp. 695, 701 (N.D. Cal. 1978); *accord Ward*, 719 F.2d at 314. As such, the above authorities clearly indicate that the plaintiff would not have a cause of action against the EEOC.

Second, the EEOC has statutory discretion to modify charges. *See* 42 U.S.C. § 2000e-5 (b). Congress empowered the EEOC to prevent certain unlawful employment practices. *See* 42 U.S.C. § 2000e-5 (a). A person who believes that she has been a victim of such practices may file a charge with the EEOC. *See* 42 U.S.C. § 2000e-5 (b). The EEOC will then "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the alleged perpetrator]." *Id.* But the charge that the EEOC eventually serves need not use the complainant's exact language; rather, as the enforcement provisions of the EEOC make clear, "charges shall be in writing under oath or affirmation and *shall contain such information and be in such form as the Commission requires.*" *Id.* (emphasis added).

Dr. Uberoi asks this court for relief because he is displeased with the language the EEOC used to frame his allegations of discrimination. *See* Compl. At 7. Dr. Uberoi believes that the EEOC's "perfection" of his original allegations amounts to a "clear derogation of ... express statutory authority." *See id.* Even assuming that the court had subject-matter jurisdiction, it would disagree with the plaintiff. The clear and express language of Section 2000e-5

(b) indicates that the EEOC has the power to formulate and present charges as it wishes, and the EEOC therefore did not act in derogation of its authority by rejecting the plaintiff's initial charge.

IV. CONCLUSION

For all these reasons, the court grants the defendants' motion to dismiss. An order directing the parties in a fashion consistent with this Memorandum Opinion is separately and contemporaneously issued this 16th day of August, 2001.

Ricardo M. Urbina, United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1579 (RMU) Filed January 16, 2002
Document No.: 13, 15

MAHINDER S. UBEROI, *pro se*, Plaintiff
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant

ORDER

Denying the Plaintiff's Motion to Alter or Amend Judgment

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this 16th day of January, 2002, it is ORDERED that the plaintiff's motion to alter or amend judgment is DENIED; and it is

FURTHER ORDERED that the plaintiff's motion to resolve the pending motion is DENIED as moot. SO ORDERED.

Ricardo M. Urbina, United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1579 (RMU) Filed January 16, 2002
Document No.: 13, 15

MAHINDER S. UBEROI, *pro se,* Plaintiff
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant

MEMORANDUM OPINION

Denying the Plaintiff's Motion to Alter or Amend Judgment

I. INTRODUCTION

This case comes before the court on the plaintiff's Federal Rule of Civil Procedure 59(e) motion to alter or amend this court's judgment, as detailed in the court's August 16, 2001 Memorandum Opinion denying the plaintiff's motion for a preliminary injunction and granting the defendant's motion to dismiss. The *pro se* plaintiff, Mahinder S. Uberoi, had brought claims against the Equal Employment Opportunity Commission ("EEOC" or "the defendant") regarding the plaintiff's employment discrimination charge. The court dismissed those claims for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The plaintiff now moves the court to reconsider its decision and amend its judgment. For the reasons that follow, the court will deny the plaintiff's motion.

II. ANALYSIS

A. Legal Standard for Amendment of Judgment Pursuant to Rule 59(e)

Rule 59(e) motions to alter or amend a judgment must be filed within 10 days of the entry of the judgment at issue.[2] *See* Fed. R. Civ. {. 59(e); *W.C. & A.N. Miller Companies v. United States*, 173 F.R.D. 1, 3 (D.D.C. 1997) (citing *Derrington-Bey v. District of Columbia Dep't of Corrections*, 39 F.3d 1224, 1226 (D.C. Cir. 1994). While the court has considerable discretion in ruling on a Rule 59(e) motion, the reconsideration and amendment of a previous order is an extraordinary measure. *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)(*per curiam*)(internal citations omitted). Rule 59(e) motions "need not be granted unless the district court finds that there is an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Id.* Finally, "[a] Rule 59(e) motion to reconsider is not simply an opportunity to reargue facts and theories upon which a court has already ruled," *New York v. United States*, 880 F.Supp. 37, 38 (D.D.C. 1995), nor is it a vehicle for presenting

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[2]For a Rule 59(e) motion to be timely, the movant must file the motion 10 days after the court's judgment is entered into the court's civil docket. *See Derrington-Bey v. District of Columbia Dep't of Corrections*, 39 F.3d 1224, 1224-26 (D.C. Cir. 1994). The D.C. Circuit has clarified that for Rule 59(e) motions, three days are not added to the time requirement when service is by mail, and district courts do not have the discretion to enlarge the 10-day period. *See id.*; Fed. R. Civ. P. 6(e) and 6(b). "The period is kept short presumably because a timely Rule 59(e) motion deprives the judgment of finality." *Derrington-Bey*, 39 F.3d at 1225. In addition, when a party files a timely Rule 59(e) motion, the time for appeal runs from the entry of the order that disposes of the motion. *See id.*

theories or arguments that could have been advanced earlier. *See W.C. & A.N. Miller Companies*, 173 F.R.D. at 3.

Motions to amend judgments brought pursuant to Rule 59(e) must not be confused with motions for relief from judgments brought pursuant to Rule 60(b). *See* Fed. R. Civ. P. 59(e), 60(b); *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996)("An untimely motion under Rule 59(e) may be considered as a motion under Rule 60(b) if it states grounds for relief under the latter rule.""(internal citations omitted). Parties generally can file motions for relief from judgment within one year from the entry of judgment. *See United States v. Beggerly*, 524 U.S. 38, 44 (1998)(quoting Fed. R. Civ. P 60(b)). While there is some overlap between motions to amend and motions for relief from judgment, there are important differences other than the difference in deadlines. For example, in most cases, the bar stands even higher for a party to prevail on a Rule 60(b) motion for relief from judgment, which permits relief when a party demonstrates fraud, mistake, extraordinary circumstances, or other enumerated situations. *See* Fed. R. Civ. P. 60(b). With these principles in mind, the court addresses the instant motion.

B. The Plaintiff Does Not Satisfy the Legal Standard

The plaintiff's brief motion fails to satisfy the legal requirements for motions to alter or amend judgments. In summary, the plaintiff has not presented the court with any indication of an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone*, 76 F.3d at 1208 (internal citations omitted). Rather, the plaintiff's motion transparently relitigates claims that this court has already expressly rejected. In particular, the plaintiff continues to challenge the EEOC's handling of his discrimination charge—despite the court's clear holding regarding the EEOC's discretion in such matters. *See* Mem. Op. At 7 (August 16, 2001)("The EEOC has statutory

discretion to modify charges"). Accordingly, the court rejects the plaintiff's motion.

III. CONCLUSION

For all these reasons, the court denies the plaintiff's motion to alter or amend the court's August 16, 2001 judgment. An order directing the parties in a fashion consistent with this Memorandum Opinion is separately and contemporaneously issued this 16th day of January, 2002.

Ricardo M. Urbina, United States District Judge

Before the United States Equal Employment Opportunity Commission, Denver District Office

Charge No. 320A10294 Filed on December 13, 2000

Mahinder S. Uberoi,
v.
Board of Regents of the University of Colorado, Henry F. Anton, Maureen Johnson Ediger, Susan C. Kirk, Tom Lucero, Jim Martin, Norwood L. Robb, Jerry G. Rutledge, Robert Sievers, and Peter Steinhauer,
Respondents.

1. Complainant Mahinder S. Uberoi is a distinguished aerospace engineer and scientist. In 1962 he was a tenured professor of Aerospace Engineering at the University of Michigan.

The University of Colorado, by its President Quig Newton, Provost and Chairman of the Department of Aerospace Engineering Sciences (Chancellor) Oswald Tippo, Dean of Engineering Max Peters, and the search committee, repeatedly begged Uberoi to become a tenured Professor of Aerospace Engineering Sciences at the University's highest salary, with

promises of substantial merit increases and promises of facilities and staff support for his research.
Uberoi finally accepted the offer effective February 1, 1963.

* * * * *

Respectfully submitted

Mahinder S. Uberoi, *pro se*
819 Sixth Street
Boulder, CO 80302
Phone: 303-442-2879

Subscribed and sworn to before me on this 12th day of December, 2000

Victoria Bergeon-Fogerty
My commission expires on
September 29, 2003

Seal
Victoria Bergeon-Fogerty
Notary Public, State of Colorado

Before the United States Equal Employment Opportunity Commission, Denver District Office

Charge No. 320A10294

Mahinder S. Uberoi,
v.
Henry F. Anton, Maureen Johnson Ediger, Susan C Kirk, Tom Lucero, Jim Martin, Norwood L. Robb, Jerry G. Rutledge, Robert Sievers, Peter Steinhauer, John Buechner, Richard Byyny, Phillip DiStefano, Ross Corotis, Michael Lightner, William M. Marine, Thomas J. Napierkowski, Robert L. Lorch and Robley D. Rhine, Respondents.

First amendment by interlineation to the charge.

1. Pursuant to 29CFR1601.12(b), the complainant hereby amends the charge.
2. The list of respondents is revised as shown herein above.
3. Paragraph 2 of the charge is replaced by the following: Henry F. Anton, Maureen Johnson Ediger, Susan C Kirk, Tom Lucero, Jim Martin, Norwood L. Robb, Jerry G. Rutledge, Robert Sievers, Peter Steinhauer are or were regents of the University of Colorado, John Buechner was the president of the University, Richard Byyny is the chancellor of the Boulder campus, Phillip DiStefano is the vice chancellor, Ross Corotis is the dean of Engineering, Michael Lightner and William M. Marine are past chairmen of the Privilege and Tenure Committee of the Faculty Senate, Thomas J. Napierkowski and Robert L Lorch were members of the committee and Robley D. Rhine was chairman of a panel of the committee. These respondents individually and jointly engaged in unlawful employment discrimination and/or retaliation against Uberoi.

* * * * *

Respectfully submitted

Mahinder S. Uberoi

Subscribed and sworn to
before me on this 11th day of April, 2001

Renne C. Bradley
Notary Public
My commission expires on
January 7, 2005

Seal
Renne C. Bradley
Notary Public, State of Colorado

Certificate of Service. On April 11, 2001 the foregoing amendment to the charge no. 320A10294 was sent by U.S. mail, next day service, to Francisco J. Flores Jr., District Director, EEOC, 303 E. 17th Ave., Suite 510, Denver, CO 80203. Mahinder S. Uberoi

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Denver District Office
303 East 17th Avenue
Denver, CO 80203

Mahinder S. Uberoi
819 Sixth Street
Boulder, CO 80302

Re: Uberoi v. University of Colorado
Charge Number: 320A10294

Dear Mr. Uberoi:

This letter is to inform you that the Equal Employment Opportunity Commission (EEOC) will not pursue the processing of your charge.

You alleged you had been discriminated due to your national origin and in retaliation for taking part in protected activity.

Respondent contends that you were dismissed due to poor performance. They contend that your teaching, researching, and service were all lacking. Due to continued poor performance you were dismissed.

A copy of Respondent's position statement was forwarded to you and you were provided an opportunity to respond. You provided a response, however, the response provided no new information concerning your allegations.

Based on the review of the evidence gathered thus far and in accordance with the EEOC's Priority Charge Handling Procedures, this charge will not be pursued further by the

EEOC. This does not certify that Respondent is in compliance with the statutes enforced by EEOC.
Attached is EEOC Form 161 dismissing your charge and informing you of your right to proceed with this matter in Federal District Court. You must file your complaint within 90 days upon receipt of the Notice of Right to Sue or else your right to file will be lost.

Sincerely,

5/17/01
Enclosure

Daniel J. McCormick
Investigator

Equal Employment Opportunity Commission
DISMISSAL AND NOTICE OF RIGHTS

To: Mr. Mahinder S. Uberoi
819 Sixth Street
Boulder, CO 80302

From: Equal Employment Opportunity Commission
Denver District Office
303 East 17th Avenue
Denver, Colo 80203

Charge No 320A10294

EEOC Representative: Andrew Williams, Enforcement Supervisor Telephone No. 303-866-1310
(See the additional information attached to this form.)

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:
The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

NOTICE OF SUIT RIGHTS

Title VII and/or the Americans with Disabilities Act: This is your NOTICE OF RIGHT TO SUE, which terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must due WITHIN 90 DAYS from your receipt of this Notice: otherwise your right to sue is lost.

5/17/01	On behalf of the Commission
Date mailed	Francisco J Flores Jr, District Director
	by Elizabeth Frank

Enclosures: Information Sheet, Copy of Charge
cc: Respondent(s) EEOC Form 161(Test 5/95)